

## **Excuse Number 11:**

### **The Telecommunications Act of 1996 Provides the Commission with No Authority to Adopt DTV Requirements During the Transition.**

Cable interests assert that the lack of Congressional action changing section 614 in the 1996 Telecommunications Act leaves the Commission without authority to adopt DTV must carry rules during the transition.

They are mistaken. The linchpin of the argument is that in 1996 "Congress did nothing in a landmark revision of the Communications Act to change its earlier pronouncements on this issue." Therefore, they assert, because 614(b)(4)(B) was enacted to "ensure that any free, over-the-air broadcasts by DTV transition signals were not entitled to mandatory carriage," the 1996 Act is significant only in that it made no change in the 1992 Act. ALTV concurs that the 1996 Act made no change in section 614. Cable interests' argument, turns, therefore, on their premise that section 614 created no DTV must carry obligation during the transition. However, inasmuch as Congress unambiguously intended that DTV as well as analog signals be subject to must carry requirements under section 614, cable interests' argument has no merit.

## **Excuse Number 12:**

### **Section 614 May Not Be Construed to Require DTV Must Carry Requirements During the Transition Because, Thus Construed, It Would Be Unconstitutional.**

In a last gasp effort to assign the unambiguous meaning of section 614 to oblivion, cable interests argue that section 614 must be read to exclude a DTV must carry requirement during the transition in order to avoid constitutional concerns.

Such an argument draws validity only from the premise of unconstitutionality upon which it rests. According to NCTA, "reading the statute to double cable operators' and programmers' must carry burdens during the multiyear transition to digital television presents a 'serious likelihood that the statute would be held unconstitutional.'" ALTV respectfully submits that section 614 is amenable to a construction which imposes no undue burden on cable operators and programmers and has offered a proposal which takes appropriate cognizance of cable operators' concerns about channel capacity and usage. Indeed, interpreted so as to require appropriate DTV must carry rules during the transition, section 614 is no more an infringement of First Amendment rights than it has been with respect to analog must carry.

**Excuse Number 13:**

**Section 624(f) of the Communications Act Bars Any DTV Must Carry Requirement Other Than Those Mandated in Title VI.**

Cable interests contend that section 624(f) of the 1992 Act precludes the Commission from adopting any DTV must carry requirement beyond that authorized in section 614.

This argument is immaterial. It would contribute to the debate only if one agrees with Time Warner that "Section 614(b)(4)(B) is the only source of the Commission's authority to impose any such obligations, and it plainly says that cable systems can be required to carry only commercial broadcast stations 'which have been changed' from analog to digital." As shown in numerous comments filed in this proceeding, however, Section 614, which is in Title VI, is not so limited. To the contrary, it applies to DTV and analog signals. Therefore, the Commission need look no further than section 614 for authority to adopt DTV must carry rules applicable during the transition. Cable interests' argument based on Section 624(f), consequently, has no relevance or materiality in this proceeding.

#### **Excuse Number 14:**

#### **DTV Must Carry During the Transition Would Be Unconstitutional Because No Substantial Government Interest Has Been Articulated in Support of Such Rules.**

Cable interests conveniently neglect to notice any substantial government interest which would be served by DTV must carry rules during the transition. A&E states that, "[T]he interests underlying possible carriage requirements for digital broadcast signals have not been well articulated, nor have they been adopted by Congress." The same government interests which justify analog must carry rules justify DTV must carry rules, including must carry rules during the transition. Those interests were articulated by Congress in enacting section 614, which requires carriage DTV as well as analog signals. How could anyone argue seriously that interests such as preserving the benefits of local broadcasting and preserving public access to multiple sources of information (especially to noncable homes) suddenly are irrelevant when signals are transmitted in a digital format? Is fair competition to be of no interest once television programming flows to viewers' homes via digital rather than analog signals? To conclude that Congress had the same basic interests at heart in seeking to assure cable carriage of DTV signals involves no stretch of mind or imagination. What does strain credulity is the implicit notion that these interests are unstated and irrelevant with respect to DTV during the transition, but somehow will emerge resplendent to justify DTV must carry *post*-transition. Cable interests, therefore, have chosen to block out the obvious symmetry of interests to be served by DTV, as well as analog must carry requirements.

## Excuse Number 15:

**DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interests Justifying Analog Must Carry Fail to Justify -- and, Indeed, May Be Compromised by -- DTV Must Carry During the Transition.**

Cable interests attempt to show that DTV must carry rules during the transition enjoy none of the justifications of the analog must carry rules. Indeed, they suggest that DTV must carry actually might undermine achievement of the goals which justify analog must carry rules. As Time Warner asserts:

Digital must carry rules are not needed to preserve the system of free, over-the-air broadcasting, to ensure a multiplicity of sources of video programming, or to promote fair competition among providers of video programming.

Time Warner goes on to say that these policy justifications differ from those which support analog must carry and may even thwart some of those analog goals.

Time Warner is wrong. First, the public (and especially non-cable subscribers, who generally are thought of as among the less affluent) has a vital and continuing interest in free, over-the-air broadcast service. This interest is no less substantial just because signals are transmitted in a digital format. Whether the actual signal is a digital signal or an analog signal, it is part of the system of local television stations which Congress sought to preserve via must carry requirements. The heart of the system is hundreds of local television stations which ultimately will offer free, universally available broadcast service exclusively in digital form. Each of those stations will contribute to the welfare of its community and enhance the diversity of services available. To those viewers with only off-air service, local television stations' DTV service will be especially valuable -- just as analog broadcast service is enormously valuable to them today.

Second, those interests hardly may be placed on the shelf until the transition ends. DTV must carry during the transition is essential to fulfill Congress's goals. If only a few select local television stations' DTV signals are carried during the transition -- a predictable event in the absence of DTV must carry during the transition --, then the benefits and diversity of broadcast DTV service *post*-transition will be circumscribed. New DTV facilities with no cable carriage, like their analog predecessors in the absence of must carry, will falter and fail. Some

may be aborted before reaching the air.<sup>1</sup> Thus, DTV must carry rules *during the transition* will function to preserve the benefits of local broadcast service and the diversity of video programming available *post-transition*.

Third, the requirement that the largest stations in the largest markets commence DTV broadcasting more expeditiously than smaller stations and stations in smaller markets in no way undermines the purpose of the rules to protect the viability and vitality of more marginal stations.<sup>2</sup> *All* existing stations must commence DTV operations or forfeit their DTV frequency.<sup>3</sup> The Commission has provided additional time to smaller stations and small market stations in recognition of their lesser ability to shoulder the costs of constructing new DTV studio and transmission facilities.<sup>4</sup> As the Commission also has recognized, these are the very sorts of station which will depend on DTV must carry rules for their survival in the digital world.<sup>5</sup> Therefore, drawing the focus of inquiry only to the front-end of the transition, as cable interests attempt to do, ignores that the interests of all stations -- and all consumers -- would be affected by the absence of DTV must carry rules during the transition.

Discovery, tacking differently in the same wind, argues baselessly that “protecting noncable households from loss of regular television broadcasting service” could not be a proper justification for DTV must carry rules during the transition.<sup>6</sup> It contends that “loss of regular television broadcasting service” is not an issue because local television stations’ analog must carry rights will remain intact.<sup>7</sup> Discovery errs, however, in equating “regular” with “analog.” the Court in *Turner I* and *Turner II* meant “regular” in contradistinction to “cable” television. It made no distinction between analog and digital television. Discovery’s argument is, thus, off base.

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<sup>1</sup>Haring, John, Strategic Policy Research, *The Economic Case for Digital Broadcast Carriage Requirements*, (October 13, 1998) at 11-16 [hereinafter cited as *Economic Case*], attached to ALTV Comments.

<sup>2</sup>See Time Warner Cable Comments at 23.

<sup>3</sup>*Fifth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 12808 (1997), at ¶70 [hereinafter cited as *Fifth Report and Order*].

<sup>4</sup>*Fifth Report and Order* at ¶78.

<sup>5</sup>*Notice* at ¶33.

<sup>6</sup>Discovery Comments at 16.

<sup>7</sup>Discovery Comments at 16.

Discovery, lastly, argues blindly that DTV must carry rules during the transition find no justification in the goal of promoting fair competition.<sup>8</sup> Analog must carry, they say, is enough. Moreover, no basis exists for placing such a heavy burden on cable operators, cable networks, and consumers in order to favor a few local television stations.<sup>9</sup> Initially, ALTV observes that the burden is vastly overstated by cable interests. ALTV then simply asks whether using a monopoly position to deny a competitor access to two-thirds of its potential audience falls within even the most lax definition of fair competition?

Moreover, analog must carry does nothing to assure that local television stations' DTV signals are available to viewers. No less than in the case of analog signals, a local television station's DTV signal can be competitive only if it is carried on local cable systems.<sup>10</sup> Otherwise, it is denied access to a majority of its potential audience. If it is so denied the *opportunity* to compete against cable's digital programming and the DTV signals of its own local broadcast competitors, it will suffer a critical competitive disadvantage. Competition as a whole will suffer. Fair competition will not exist. Thus, cable systems' interdiction of the DTV signals of local television stations is anathema *vis-a-vis* the Congressional interest in promoting fair competition.

Finally, the obvious lack of history for DTV signal carriage in no way undercuts the sound and well-supported prediction that cable operators will treat local television stations' DTV signals no better than they treated their analog signals in the absence of must carry. DTV must carry rules during the transition will promote fair competition. Indeed, in their absence, fair competition will remain the impossible dream.

Therefore, in the absence of DTV must carry rules during the transition, Congress's intention to foster full and fair competition will remain just that, an intention, but one frustrated and unfulfilled.

Bellsouth Corporation wrongly discounts the goal of preserving free television because DTV allegedly is "'free' only in the loosest sense of the word."<sup>11</sup> The sole basis for this allegation is the initial high cost of DTV sets. Such arguments are a tribute to the desperation of some cable operators -- and cable wanna-be's -- to shirk any responsibility for the successful transition of all of television from analog to digital, but nothing more. The cost of sets never has been a relevant consideration

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<sup>8</sup>Discovery Comments at 17.

<sup>9</sup>Discovery Comments at 17.

<sup>10</sup>Particularly for smaller stations, DTV signals cannot be loss leaders indefinitely; ultimately, they will stand or fall on their own. In the absence of access to the two-thirds of their audiences available only via DTV must carry rules during the transition, the latter is the more likely result.

<sup>11</sup>Comments of Bellsouth Corporation *et al.*, CS Docket No. 98-120 (filed October 13, 1998) at [hereinafter cited as "BellSouth Comments"].

in differentiating free television from pay or subscription television. Indeed, it is of no moment. Regardless of how consumers receive television signals, they must have a set to view it on. Furthermore, in a few short years, the price of digital sets will come down. Meanwhile, many viewers with less impatience and smaller pocketbooks will make do with DTV-to-analog converters, which will cost far less than DTV receivers. More to the point, in the absence of DTV must carry rules during the transition, those viewers who choose to remain noncable subscribers will have a leaner menu of choices on free broadcast DTV. Their interest in a more robust variety of *free* television options is precisely the interest advanced by DTV must carry rules during the transition. Thus, Bellsouth is well wide of the mark in attempting to discount the “free” in free broadcast television.

The Office of Communications of the United Church of Christ *et al.* (“UCC *et al.*”) and Ameritech New Media in similar vein submit that stations will retain their core advertising bases during the transition, again, because the analog must carry rules will assure their carriage.<sup>12</sup> This contention fails to comprehend the likely scenario during the transition. As more consumers acquire DTV receivers and/or converters, the bulk of the television audience will migrate from analog to digital television. It hardly is as if all viewers will be watching only analog through 2006, then shift instantaneously to DTV on January 1, 2007. Thus, the significance of the analog audience (and concomitantly, analog must carry) will diminish, while the significance of the digital audience (and DTV must carry) will grow. Local television stations which cannot build their digital audiences will be left behind and ultimately left out.

Ameritech and UCC *et al.* add cavalierly that broadcasters are making enough money anyway.<sup>13</sup> Some are. Others are not. As illustrated in Table One, below, at least one quarter of the nation’s stations operate at or below the fringe of profitability. Among ALTV’s member stations, not all Fox affiliates in the lower 25th percentile operated at a profit in 1997; none of the affiliates of UPN and WB and none of the independents in the lower 25th percentile operated profitably. These, of course, are the stations for which must carry remains essential. These are stations which also are required to construct and operate new DTV facilities at their own expense. Thus, UCC *et al.*’s claim that “the financial conditions which justify analog must carry are not the same during the transition, even for the smaller stations that will not receive retransmission consent” is fanciful, indeed, wishful thinking.

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<sup>12</sup>Comments of UCC, *et al.*, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as “UCC Comments”]; Ameritech Comments at 14-15.

<sup>13</sup>UCC Comments at 10; Ameritech Comments at 14.



Table One

Lower 25%ile • 1997 • All Stations

<u>Affiliation</u>	<u>Net Revenue</u>	<u>Pre-Tax Profits</u>
ABC	\$5,782,003.00	\$80,911.00
CBS	\$5,850,992.00	\$42,180.00
Fox	\$4,306,143.00	\$27,907.00
NBC	\$5,870,325.00	\$393,136.00
UPN	\$2,543,646.00	(\$424,570.00)
WB	\$3,085,436.00	(\$1,331,907.00)
Independent	\$2,451,508.00	(\$228,336.00)

*Source: 1998 NAB/BCFM Television Financial Report*

Likewise, Ameritech's assertion that no station would be in jeopardy because the broadcast television industry has thrived in recent years exemplifies false generalization. Many stations do operate at the margin and hardly may be expected to subsidize their DTV operations through the entire transition period. Only DTV must carry rules during the transition will assure that their DTV signals are available to all DTV viewers and enable them to become self-sustaining as quickly as possible.

Finally, NCTA claims that non-cable subscribers actually would suffer if DTV must carry rules during the transition accelerated the transition. NCTA reasons that a viewer who cannot afford cable also cannot afford a DTV receiver or converter. Thus, NCTA urges, the substantial government interest in maintaining free broadcast television service would be compromised rather than advanced by DTV must carry rules during the transition.<sup>14</sup> The faulty premise of this argument is the assumption that DTV receivers and converters will remain expensive. As in the case of every other video and digital device which has entered the marketplace, the prices for these new devices are expected to fall dramatically. As the end of the transition approaches, consumers likely will be replacing their analog receivers in due course with DTV receivers at prices no less daunting than what they might have paid for an analog set. Furthermore, as hard as it may be for NCTA to comprehend, some consumers may be perfectly satisfied with just broadcast television service. Particularly if local television stations provide multiple program services, they will be viewed as closer substitutes for cable service. Therefore,

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<sup>14</sup>NCTA Comments at 26.

NCTA's new found concern for non-cable subscribers fails to produce a sound basis for discounting the need to preserve off-air DTV choices for non-cable subscribers.

Discovery also makes the absurd claim that DTV must carry rules during the transition would reduce local television stations' incentives to "invest in improved transmitters and broadcast technology."<sup>15</sup> Local television stations are not going to write off the 30-40% of their audience which continues to rely on off-air reception.<sup>16</sup> ALTV, for example, pushed the Commission to permit UHF stations to move quickly to improve their DTV facilities to more closely approach the reach of their VHF competitors' DTV signals.<sup>17</sup> Discovery's position, born of an understandable ignorance of broadcasting, is, therefore, untenable.

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<sup>15</sup>Discovery Comments at 29.

<sup>16</sup>Cable interests assert that DBS subscribers continue to rely on off-air reception for access to local television stations. However, as recently stated by the Satellite Broadcasting and Communications Association, "[M]any potential satellite subscribers may not have antennas at all, because they are often disaffected cable subscribers who had their rooftop antennas removed when they subscribed to cable." Comments of the Satellite Broadcasting and Communications Association, CS Docket No. 98-201 (filed December 11, 1998) at 20, n.52.

<sup>17</sup> Notably, ALTV was confident even then that the Commission would adopt DTV must carry rules during the transition as per the statute. However, as ALTV has often emphasized, cable carriage is not the panacea *vis-a-vis* resolving the competitive disparity between UHF and VHF stations. Petition for Reconsideration, MM Docket No. 87-268 (filed June 11, 1997, by ALTV).

## Excuse Number 16:

### **DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving the Existing Structure of Broadcast Television Has Eroded.**

Ameritech questions whether the unique benefits of broadcast television remain "sufficiently tangible, demonstrable and assured to justify cable carriage." Ameritech suggests that "as cable operators increasingly create local public affairs programming, little if anything remains that makes broadcast television unique."

This approach to the issue is flawed. First, it focuses on program content. Must carry rules, however, are considered content neutral.<sup>1</sup> What the must carry rules protect is a *system* of broadcasting consisting of a dispersed array of *local* television stations throughout the nation, which provide a service that is free and universally available.<sup>2</sup> Cable television -- or, indeed, any other video medium -- is decidedly *not* free. Cable television, like other MVPDs, is *not* universally available. Furthermore, most communities are served by *multiple, competitive* local television stations, which provide a diversity cable, typically as a *monopoly* provider, cannot equal. Second, local television stations -- unlike cable systems -- remain subject to an obligation to operate in the public interest.<sup>3</sup> Third, ALTV finds it ironic that cable interests would tout their local news channels, when they oppose must carry in order to carry more *national* cable networks and apparently are prepared to jettison the purportedly ultimate public affairs channel, C-SPAN, at the drop of a hat.

Lastly, in this regard, despite the basic irrelevance of program content, ALTV must observe that cable news channels are creatures of a few large markets. Broadcast news and public affairs are found alive and well in all markets from New York to Glendive. Therefore, contrary to the assertions of Ameritech and others, this nations system of local broadcasting, which will undergo no change, save for the shift to a digital transmission standard, in the transition to DTV remains immensely valuable and demonstrably deserving of the protection to be provided by DTV must carry rules during the transition.

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<sup>1</sup>Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).

<sup>2</sup>Turner II, 1997 LEXIS 2078, 23-25.

<sup>3</sup>Turner II, 1997 LEXIS 2078, \*

## Excuse Number 17:

### **DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving a Diversity of Programming from Multiple Sources Would Be Disserved by DTV Must Carry Rules During the Transition.**

Discovery and Ameritech argue that the second government interest cited by the Court in *Turner II* – “widespread dissemination of information from a multiplicity of sources” – is inapplicable.

First, Discovery states that protecting local television stations’ DTV as well as analog signals would do nothing to enhance source diversity. This view is horribly short-sighted. It implicitly assumes that local television stations will maintain their analog and DTV facilities forever, which, of course, they will not. In the long run, the absence of DTV must carry rules during the transition would imperil the viability of DTV stations denied carriage on local cable systems. Only the stations carried by cable would have had even the opportunity to survive. The failure of even a few stations would reduce the multiplicity of sources available to all viewers once the transition ends.

Notably, the end of the transition is subject to no delay directly based on the number of surviving stations. Maintenance of the proverbial rump broadcasting service referenced in *Turner II* might well be sufficient to promote DTV set and converter sales sufficient to satisfy the criteria established by Congress for terminating the transition. Thus, a significant number of smaller stations may be sacrificed, thereby reducing substantially the multiplicity of services available to noncable subscribers. Cable subscribers also would suffer this loss of diversity, but the loss of two or three among 50 to 100 program channels is small beer compared to the loss of two or three of six or seven local television stations. The government interest in diversity, therefore, is very heavily implicated in the decision whether to adopt DTV must carry rules during the transition.

Second, Discovery alleges that diversity would be impeded by DTV must carry rules during the transition because such rules could require cable operators to carry twice as many signals. First, of course, this is far too simplistic. As will be described below in considerable detail, the marginal impact of DTV must carry rules during the transition will verge on the *de minimis*. No double burden is likely to befall any cable system. Thus, the effect of DTV must carry rules during the transition on the diversity of program services offered by cable systems is likely to be negligible. Second, ALTV wonders how the same cable industry which lusts after cable operators’ editorial freedom can suggest that they contribute to diversity, especially with respect to multiple sources. If cable systems are little more than conduits for programming from other sources, why guard their editorial discretion so jealously? If they are content controllers, then how is what they provide diversity? Has not everything they carry passed through the same filter? Such

musings may be no more than a worthy aside, but ALTV must admit some chagrin that cable interests long have been able to exploit having it both ways!

Picking up on the same theme, NCTA claims that analog must carry will preserve all local television stations' voices. Ameritech similarly posits that "because both [analog and digital] signals would be subject to the same editorial control, they would represent the same viewpoint..." The purpose of the transition, however, is to wean viewers from analog broadcasting. Ultimately, that analog voice will be muted forever. If the digital voice of that local television station has been muted from the outset because cable operators were permitted to determine which broadcast voices were to be heard and which were not, then the voices of local television stations hardly will have been preserved. Only DTV must carry rules during the transition will assure that the voices of all local television stations continue to be heard in the upcoming digital millennium.

## Excuse Number 18:

### **DTV Must Carry During the Transition Would Be Unconstitutional Because Promoting an Expeditious Transition to DTV Is Not a Substantial Government Interest.**

Cable interests float the notion that promoting an expeditious transition to DTV cannot be considered a substantial government interest justifying DTV must carry rules during the transition.

This is preposterous. Far too much is at stake. First, the government has a substantial interest in return of local television stations' analog spectrum. Only after the transition is complete can this occur. Only after the spectrum is returned can it be auctioned. Congress set a deadline for return of spectrum by the end of 2006 precisely in recognition of this interest.<sup>1</sup> More is involved than revenue for the government, which even Time Warner admits is substantial. The liberation of this substantial amount of spectrum will provide the opportunity for development of new communications services, including more local television stations.<sup>2</sup> These are substantial government interests.

Nonetheless, Time Warner insists that cable and DBS can carry off the transition to DTV, thereby negating any government interest in assuring consumer access to the DTV signals of local television stations as a means of expediting the transition. This epitomizes wishful thinking in two salient respects. First, Time Warner undoubtedly would love to see consumers be weaned from analog *broadcasting* to digital *cable*. Denying or delaying carriage of local television stations' DTV signals would play an important role in making Time Warner's wish come true. Moreover, it confirms that cable operators will have even greater incentives to deny carriage to local television stations' DTV signals than they did with respect to their analog signals.<sup>3</sup> Second, one must be dubious of cable's ability

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<sup>1</sup>As stated in the Conference Report:

Section 3003 of the conference agreement adds a new section 309(j)(14)(A) to the Communications Act to *require* the Commission to reclaim the 6 MHz each broadcaster now uses for transmission of analog television service signals by no later than December 31, 2006.

<sup>2</sup>These newly available channels will provide an opportunity for new entrants into television broadcasting in a manner unprecedented in recent years.

<sup>3</sup>Time Warner offers the additional insight that "no one could argue that consumers will refrain from purchasing digital TV sets unless every local digital broadcast signal is carried on cable." Time Warner Cable Comments at 7, n.8. Again, this buttresses the prediction that cable operators will carry some, but not all local television stations' DTV signals, just as it did in the case of analog signals. More to the point, it evades the issue of how many local television stations's DTV signals must be carried to stimulate demand for DTV sets sufficiently to conclude the transition on a timely basis.

to add sufficient impetus to the transition via their own digital offerings. Broadcast programming remains the most popular programming on cable systems. Little reason exists to suggest that this will not continue to be the case in the digital era. Furthermore, many cable systems have placed their digital programming on a separate digital tier for which they make an additional charge to their subscribers. This only compounds the reduced potential inherent in a medium which leaves 30 to 40 per cent of consumers unserved. Thus, assuring carriage of local television stations' DTV signals via DTV must carry rules during the transition likely will remain essential to a prompt completion of the transition period.

## Excuse Number 19:

### **DTV Must Carry During the Transition Would Be Unconstitutional Because No Record or Evidence Exists to Demonstrate the Need for DTV Must Carry Rules During the Transition.**

Cable interests join in a resounding chorus acclaiming the lack of record evidence to support a conclusion that DTV must carry rules during the transition are necessary to remedy a genuine harm.

As deafening as their piercing vibrato may be, it really is just so much noise. First, their logic would demand that the government stand idly by until a predictable harm occurs. One might envision the government taking no action in preparation for the impending impact of a comet on the earth because no harm will occur until the comet actually hits. The Court hardly has countenanced such an approach, even in the case of cable television regulation. Thus, in *United States v. Southwestern Cable Co.*, 392 U. S. 157, 176-177 (1968), the Court upheld the Commission's initial regulation of cable television carriage of broadcast signals, stating:

The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them."

Here the Commission again must refuse to await the all too predictable repeat of events surrounding carriage of local television stations' analog signals. This position draws further support from *Turner II*. Therein the Court was no less insistent that Congress could act prophylactically:

A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. "An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly." *Turner*, supra, at 672 (STEVENS, J., concurring in part and concurring in judgment). As a Senate Committee noted in a Report on the Cable Act, "we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational predication of the consequences of inaction and of the effects of regulation in furthering governmental interests." Senate Report, at 60.<sup>1</sup>

Therefore, the Commission has no obligation to await the occurrence of what is eminently predictable (*i.e.*, the failure of cable systems to carry significant numbers

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<sup>1</sup>*Turner II*, 1997 LEXIS 2078, \*58.



of local stations' DTV signals, the resultant weak performance, if not demise of those stations' DTV services, and a sluggish transition).

Second, the prediction that cable operators will refuse to carry the DTV signals of a significant number of local stations is rational and well-supported given the history of noncarriage of analog signals in the absence of must carry. It demonstrates in no uncertain terms that, left to their own devices, cable operators will pursue their own economic interests. If nothing else, the haste with which they apparently will drop C-SPAN clearly suggests that economic motivations will dominate carriage decisions. They certainly have no interest in preserving free, broadcast service, especially to non-cable subscribers. Thus, as in the case of analog television, every reason exists to predict that cable systems will carry those DTV signals which they believe will contribute to their profitability. Other local television stations' DTV signals simply will not be carried.

Third, the record already includes evidence of harm to the efforts of local television stations to commence DTV service. For example, licensees are complaining that lack of certainty about carriage is hampering their ability to finance their new DTV facilities. As observed by the Station Representatives Association:

Markets hate uncertainty. Uncertainty about whether viewers will have access to the digital signals of their local stations will discourage advertiser support of the new digital services, deter programmers, *scare off investors*, and spook consumers who might otherwise buy sets to receive new digital services.<sup>2</sup>

The prediction of noncarriage is further supported by cable interests, who readily reveal the economic incentives of cable operators to maximize revenue per megahertz of capacity and the importance of advertising dollars to cable networks. The cable industry's uncompromising attitude on the issue of DTV must carry rules during the transition, perhaps, best reveals its deep-seated antagonism towards carrying all local stations' DTV signals. History *is* destined to repeat itself. The Commission hardly need pretend otherwise.

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<sup>2</sup>Comments of the Station Representatives Association, CS Docket No. 98-120 (filed October 13, 1998) at 4 [emphasis supplied][hereinafter cited as "SRA Comments"]. The looming menace of uncertainty also answers those like Microsoft and UCC *et al.*, who argue that adoption of DTV must carry rules during the transition would be premature. Comments of Microsoft Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as "Microsoft's Words"]; UCC Comments at 3 *et seq.* Prematurity arguments also illustrate the danger of looking at the trees instead of the forest. When all is said and done, the absence of DTV must carry rules during the transition will leave many stations with DTV signals unavailable to the bulk of their potential audiences.

## Excuse Number 20:

### **DTV Must Carry During the Transition Will Be Unnecessary Because Local Television Stations' DTV Signals Will Be Carried Voluntarily.**

Cable interests myopically call DTV must carry rules during the transition unnecessary because "retransmission consent and private negotiation will be the vehicle by which the overwhelming majority of broadcasters will obtain cable carriage for their digital signals."<sup>1</sup> Time Warner in a similarly self-serving fashion expresses its confidence in resolution of carriage issues via "private negotiations between cable operators and broadcasters."<sup>2</sup>

Such confidence in voluntary carriage agreements is not shared by many local television stations, as the record plainly demonstrates. In the words of one station owner:

Many of Pappas's stations operate in the UHF band and are either not affiliated with a network or affiliated with one of the newer or emerging networks, such as Fox Broadcasting Company, The WB, or the United Paramount Network. Lacking the leverage of longer-established VHF stations that enjoy affiliations with the Big Three, all but one of Pappas's stations have uniformly been forced to opt for must-carry. Given those facts, and the likelihood that they will persist through at least the next three-year election cycle, retransmission consent offers Pappas and those similarly situated no realistic alternative to must carry for both analog and DTV signals.<sup>3</sup>

This sentiment is shared by UPN affiliates:

The cable industry has made it clear in its opposition to the imposition of DTV must-carry that it will not carry all Of the DTV signals available in a market unless required to do so. That is particularly true with regard to affiliates of the new networks and independent television stations....[T]he greater the diversity of UPN affiliate programming and the more defined is the niche programming broadcast by UPN affiliates and independent stations, the less likely cable systems are to voluntarily carry such stations.<sup>4</sup>

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<sup>1</sup>Discovery Comments at 31.

<sup>2</sup>Time Warner Cable Comments at 10-11.

<sup>3</sup>Pappas Comments at 22.

<sup>4</sup>UPN Affiliate Comments at 3.

Local television stations in smaller markets are no less dubious of voluntary carriage agreements:

An ironic twist to the proposal to use [retransmission consent] negotiations to obtain DTV carriage is that the only stations that will be able to do so are the ones that are less likely to have trouble obtaining DTV carriage: namely, major market affiliates of the major national networks on cable systems close to their city of license. This excludes many of the stations Congress was concerned about in enacting must carry, including the small independent stations.<sup>5</sup>

Indeed, as ALTV already has shown, negotiations appear to involve large market affiliates, not the marginated stations which bring little bargaining power to the table.<sup>6</sup> Therefore, retransmission consent agreements will not be a viable vehicle for voluntary carriage of the DTV signals of many local television stations.<sup>7</sup>

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<sup>5</sup>Pikes Peak Comments at 10; *see also* Comments of Retlaw Enterprises, Inc., CS Docket No. 98-120 (file October 13, 1998) at 3 [hereinafter cited as "Retlaw Comments"].

<sup>6</sup>ALTV Comments at 46-47.

<sup>7</sup>In any event, leaving DTV carriage to marketplace negotiations is an illusion, as so aptly noted by the Station Representatives Association:

Nor should the Commission leave these issues to the marketplace or to private party negotiations. With the compulsory license that allows cable to retransmit broadcast signals, retransmission consent and various other regulations derived from Section 307(b), this is not, and never has been, an unregulated marketplace.

SRA Comments at 4.

## Excuse Number 21:

### **DTV Must Carry Rules During the Transition Would Be Unconstitutional Because They Would Double the Number of Signals Cable Systems Would Be Required to Carry, Thereby Imposing an Undue Burden on Cable Operator's Editorial Prerogatives.**

Just as they did in response to efforts to impose analog must carry rules, cable interests do everything but pound their shoes on the table in protest against the supposedly enormous burden DTV must carry rules would impose during the transition. They claim that the must carry burden would double — *at least*.<sup>1</sup> They envision the “sacrifice” of a “staggering number of existing cable networks.”<sup>2</sup>

Their claims, however, fail to withstand analysis, just as they crumbled under judicial review of the analog must carry rules.<sup>3</sup> The true burden of DTV must carry rules during the transition will be very modest. Cable interests argue that DTV must carry rules during the transition would more than double the burden of analog must carry and then some.<sup>4</sup> The “double the burden” argument at least enjoys a superficial plausibility. If a system is carrying X number of local television stations under analog must carry, then DTV must carry rules during the transition logically might be expected to require the system to carry 2X number of must carry stations. The implicit assumption, of course, is that local television stations electing must carry for their analog signals will elect must carry for their DTV signals. Cable interests, however, do not stop there. They claim that the burden would more than double because cable operators currently carry no digital signals.<sup>5</sup> The implicit assumption there is that more stations will elect must carry for their DTV signals than now elect must carry for their analog signals. Thus, for example, a cable system carrying the analog signals of six local television stations, four via retransmission consent and two under must carry, might end up carrying the DTV signals of three local stations under must carry and three via retransmission

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<sup>1</sup>See, e.g., NCTA Comments at 30; Discovery Comments at 20-21.

<sup>2</sup>A&E Comments at 41.

<sup>3</sup>*Turner II*, 1997 LEXIS 2078, \*62-64.

<sup>4</sup>NCTA Comments at 30.

<sup>5</sup>NCTA Comments at 30.

consent. Its two station analog must carry burden would more than double from two analog signals to five signals (two analog and three digital) under an analog plus digital must carry rule. This, however, is the high point of the analysis from cable's perspective.

From there, it begins to dissemble. First, a double burden turns out to be *de minimis*. The number of analog signals added pursuant to must carry has been minuscule, usurping a mere 1.18 per cent of active cable channels.<sup>6</sup> Assuming no increase in the number of cable channels (an absurd assumption), doubling the must carry burden still would divert little more than two per cent of active cable channels to must carry signals. In other words, twice *de minimis* still is *de minimis*.

Second, the burden hardly is likely to exceed twice *de minimis*. No reason at all exists to believe that stations which now secure carriage for their analog signals will not gain carriage of their DTV signals on the same basis. Indeed, as shown above, the cable industry itself insists that "retransmission consent and private negotiation will be the vehicle by which the overwhelming majority of broadcasters will obtain cable carriage for their digital signals."<sup>7</sup> Therefore, the constitutionally negligible number of must carry signals may double, but no basis exists for arguing that the burden would be any greater.

Third, whereas cable interests may grouse that they have no excess capacity to carry local television stations's DTV signals and point to the burden they assume in carrying additional non-must carry DTV signals, this is a burden they assume voluntarily. It is of no constitutional moment.<sup>8</sup> Moreover, displaced cable networks have no cause to complain about infringement of their rights when a cable operator determines that carriage of a local television stations' DTV signal better serves the cable operator's interests.

Fourth, the very marginal increase in must carry demands will occur gradually

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<sup>6</sup>As the Court found in *Turner II*, 1997 LEXIS 2078, \*61, \*63:

Appellees note that only 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must-carry....

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It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry.

<sup>7</sup>Discovery Comments at 31.

<sup>8</sup>As the Court observed in *Turner II*, 1997 LEXIS 2078, \*63[citations omitted]:

While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers because those stations were carried voluntarily before 1992, and even appellants represent that the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so.

over time and will be accompanied by increases in cable channel capacity.<sup>9</sup> Indeed, if, as cable interests state, negotiations involving the large market stations first required to commence DTV transmissions are “constructive and promising,” carriage of local television stations’ DTV signals pursuant to a must carry requirement may be years away.<sup>10</sup>

Fifth, none of this takes into account the considerably greater capacity of digital transmission. Cable interests are willing to let the Commission assume that the margin for decision will take place in a world of six megaHertz television channels. Local television stations’ analog signals will occupy six megaHertz of bandwidth, their DTV signals another six, for a total of twelve megaHertz. At the same time, cable networks will continue to occupy the same six megaHertz of bandwidth. MegaHertz do add up quickly at that rate. However, in a digital environment the arithmetic changes dramatically.<sup>11</sup> The analog signals of both local television stations and cable networks may be converted to digital -- just like the DBS operators do! Six megaHertz now becomes a multilane path, capable of transmitting six or more up-converted analog signals. Even assuming a more modest 4:1 capacity ratio, those 12 local stations’ analog signals now occupy 18 megaHertz of bandwidth. At the same time, the 60 cable networks now occupy 90 megaHertz of bandwidth. Thus, using 108 megaHertz or 18 six-megaHertz channels, a digital cable system (or the digital portion of a hybrid system) may provide 72 channels of converted analog broadcast and cable network programming. ALTV dares suggest this would leave a staggering amount of capacity on any reasonably sized cable system for pure digital programming, including local television stations’ DTV signals. For example, a 750 MHz system (approximately 120 six-megaHertz channels) would retain a hundred six-megaHertz channels for digital or other uses. Even then, local television stations’ DTV signals would not occupy six megaHertz, even during HDTV transmissions.<sup>12</sup> Two HDTV broadcast signals can be carried in six megaHertz.<sup>13</sup>

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<sup>9</sup>See, e.g., Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 98-120 (filed October 13, 1998) at 16-17 [hereinafter cited as “CEMA Comments”].

<sup>10</sup>Discovery Comments at 31.

<sup>11</sup>The cable industry hardly is dragging its feet into the digital era. General Instruments, for example, reports installing “over 600 digital headend systems for cable operators throughout the United States.” Comments of General Instruments Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 2 [hereinafter cited as “GI Comments”].

<sup>12</sup>Cable systems may elect to use QAM modulation, thereby “increasing the efficient use of cable spectrum and reducing the possibility that other cable services will have to be dropped to make room for the new digital broadcast services.” Comments of MediaOne Group, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 12 [hereinafter cited as “MediaOne Comments”]. As MediaOne further asserts:

[A]ny RF modulation format conversion from VSB to QAM is totally transparent to broadcasters’ underlying video content (including transmission of enhanced program information, such as

Thus, of those 100 remaining channels, the 12 local television stations' DTV signals in HDTV format would account for only six. On a 450 MHz system (approximately 54 channels), 36 six-megaHertz channels would remain available for digital. Again, the 12 local television stations' DTV signals would account for six channels, leaving 30 for the cable operator.<sup>14</sup> Again, only those stations securing carriage of their DTV signals via must carry are pertinent to the analysis. Therefore, the "burden" of DTV must carry rules during the transition would be but a tiny and fading blip on the constitutional radar screen.

Sixth, even analog systems with substantial capacity would have no significant difficulty carrying the DTV signals of a few additional local television stations. Again, the marginal effect of DTV must carry rules during the transition would consist only of the DTV signals of the few stations which cable systems otherwise would not carry. Cable systems by their own admission -- even insistence -- will be carrying the DTV signals of most local television stations. Thus, they will be choosing freely to carry such signals with complete awareness and acceptance of the effect on carriage of other program channels. In other words, whatever cable networks they may elect to drop in order to carry voluntarily the signals of most local television stations' DTV signals, those drops may not be laid at the feet of DTV must carry rules during the transition! Only the few signals not otherwise carried may be considered in assessing the impact of the rules on cable operators' constitutional rights.

Seventh, contrary to some cable interests' assertions, even pure analog cable systems would *not* be required to provide additional converters or set-top boxes for subscribers in order to carry the DTV signals of local television stations.<sup>15</sup> Broadcasters' DTV signals may be passed through the cable system intact and fed directly to the subscribers DTV receiver. As CEMA points out:

The digital broadcast signal can be retransmitted without alteration on an analog cable system within an existing 6 MHz channel. At the consumer's television set the signal either could be bypassed through the cable box without change and connected to the DTV input jack on the receiver, or the cable can be directly connected to the DTV jack and the television set tuned to the appropriate channel.

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baseball scores). The conversion from VSB to QAM causes no degradation of broadcast video quality, rather, the same digital signal quality which broadcasters deliver to the cable headend will be received by cable subscribers with digital television receivers."

MediaOne Comments at 12.

<sup>13</sup>See Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 98-120 (filed October 13, 1998) at 17 [hereinafter cited as "CEMA Comments"].

<sup>14</sup>Subject, of course, to PEG requirements, etc.

<sup>15</sup>E.g., NCTA Comments at 32.

All functions of the digital signal will be processed to the full capability of the television set.<sup>16</sup>

As long as the receiver is capable of demodulating and processing off-air DTV signals, it also would be capable of demodulating, processing, and displaying the DTV signal "passed through" by the cable system. Consequently, very little would be required of an analog cable system to pass through local television stations' DTV signals.<sup>17</sup>

Thus, cable interests' penchant for exaggeration of the impact of must carry rules stands revealed yet again. The Commission must not be cowed by cable interests' incessant wailing about capacity constraints. They are just noise, discordant with the facts and served up only to distract the Commission from the very marginal impact of DTV must carry rules during the transition.

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<sup>16</sup>CEMA Comments at 21-22; *see also, e.g.*, Comments of Harris Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 8 [hereinafter cited as "Harris Comments"]. As CEMA emphasizes:

While cable operators for their own reasons may wish to manipulate the digital signal and process, remodulate, or demodulate it within their systems, including in cable set-top boxes, such cable processing is purely for the benefit of the cable operator.

CEMA Comments at 13.

<sup>17</sup>ALTV reiterates that it has proposed rules which would impose DTV must carry rules during the transition only on cable systems which (1) voluntarily upgrade their facilities to digital (in whole or in part) or (2) have substantial analog capacity. No system would be forced to upgrade. No analog system would be required to provide boxes to downconvert local television stations DTV signals, provided the signal was pass through intact in its off-air transmission format. *See* ALTV Comments at 22.



## Excuse Number 22:

### **Cable System Upgrades Provide No Basis for Burdening Cable Systems with the DTV Signals of Local Television Stations.**

Cable interests argue that system upgrades and channel capacity increases are immaterial *vis-a-vis* DTV must carry rules during the transition.<sup>1</sup> They allege first that cable systems upgrade their plants to accommodate new cable services (including cable networks, pay channels, pay-per-view, digital music, data, and telephone service).<sup>2</sup>

Such posturing neglects that cable interests also insist that they will carry most local television stations' DTV signals in the absence of must carry. One may conclude, then, that the new services for which systems are upgraded includes the DTV signals of local television stations. Indeed, because local television stations, unlike cable systems, are *required* to initiate DTV service, they likely will provide more DTV programming more quickly than cable networks and, at least, will provide some of the most popular DTV programming early in the transition. As cable systems did in the sixties and seventies, they will use broadcast programming to prime the interest of cable subscribers. The bulk of broadcast DTV signals carried will fall into the same category of program services as new cable networks, *i.e.*, new, highly attractive services desired by consumers. Therefore, they are very much part of the equation in cable systems' impetus to upgrade their systems and/or expand channel capacity.

Furthermore, cable interests engage in doublespeak in complaining that local television stations' DTV signals would be duplicative services "that can only be received by a handful of high-income consumers with expensive digital TVs."<sup>3</sup> Will the digital versions of new cable networks be any different? Only the purported handful of consumers with DTV sets will be able to see them. ALTV wonders why this is such a great concern if the signal is provided by a local television station, but of no apparent moment if the signal is provided by a cable network.

Finally, as so eloquently noted by Circuit City Stores, Inc.:

Significant investment in digital cable technologies began years ago and continues to accelerate each year, calling into question any claim

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<sup>1</sup>See, e.g., MediaOne Comments at 23.

<sup>2</sup>MediaOne Comments at 23.

<sup>3</sup>MediaOne Comments at 24.